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735 Putnam Pike Operations, LLC d/b/a Greenville Skilled Nursing and Rehabilitation Center and New England Health Care Employees Union, District 1199, a/w Service Employees International Union (SEIU). Case 1–CA–46619

April 13, 2011

## DECISION AND ORDER

## BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on January 11, 2011, and an amended charge on January 20, 2011, the Acting General Counsel issued the complaint and notice of hearing and an amendment to complaint on January 24 and 31, 2011, respectively, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 1-RC-22474. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed a consolidated answer to complaint and amendment to complaint admitting in part and denying in part the allegations in the complaint.

On February 8, 2011, the Acting General Counsel filed a Motion for Summary Judgment. On February 10, 2011, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response. The Acting General Counsel filed a reply to the Respondent's response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

# Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis that the unit is inappropriate.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence. The Respondent asserts for the first time in its response to the Notice to Show Cause that the premature issuance of the certification of representative, which the

Region issued 1 day before the Respondent's time to file objections to the election had lapsed, constitutes a special circumstance that requires the Board to reexamine the decision made in the representation proceeding. We find no merit in this contention.

The undisputed facts show that the election was held on October 15, 2010, and the Regional Director issued a tally of ballots on November 23. Under the Board's Rules, any objections to the election were to be filed within 7 days, i.e., by November 30. However, the Regional Director prematurely issued a certification of representative on November 29, stating that no timely objections had been filed. Thereafter, on December 2, the Acting Regional Director issued a corrected certification of representative, again indicating no timely objections had been filed.

On these facts, we cannot conclude that the Respondent was denied a reasonable opportunity to exercise its right to challenge the election due to the premature issuance of the certification. First, there is no evidence that the Respondent raised the premature issuance of the certification to the Region in the representation proceeding, asserted to the Region that it had a basis on which to file objections, or proffered any objections to the Region. In addition, the Respondent did not refer to the premature issuance of the certification in its response to the Union's request to bargain, or in its communications with the Region regarding the unfair labor practice charges. The Respondent merely indicated that it was refusing to bargain because it intended to challenge the Board's unit determination in the underlying representation proceeding.

Second, even assuming that the Respondent believed it was precluded from addressing this issue in the underlying representation proceeding, it had the opportunity to raise this asserted preclusion in its answer to the complaint. However, it failed to do so. Further, despite its protestations that the corrected certification did not cure the Region's error of issuing the original certification before the Respondent had an opportunity to file objections, the Respondent has never submitted any election objections for the Board's consideration or indicated what actual prejudice it suffered from the premature issuance of the certification.

We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate* 

<sup>&</sup>lt;sup>1</sup> The Respondent does not refute the Acting General Counsel's statement that this certification was mailed to the parties. Thus, it is apparent that the earliest date on which the Respondent could have received the certification was on the day its objections were due.

Glass Co. v. NLRB, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

#### FINDINGS OF FACT

#### I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Greenville, Rhode Island (the Greenville facility), has been engaged in the operation of a skilled nursing and rehabilitation center.

Annually, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$100,000, and purchased and received at its Greenville facility goods valued in excess of \$50,000 directly from points outside the State of Rhode Island.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, New England Health Care Employees Union, District 1199, a/w Service Employees International Union (SEIU), is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

# A. The Certification

Following a representation election conducted on October 15, 2010, the Union was certified on December 2, 2010,<sup>3</sup> as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time registered nurses, including per diem registered nurses but excluding the director of nursing, day supervisor/unit manager, nurse practice educator, floating shift supervisor, MDS coordinator, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

## B. Refusal to Bargain

On about November 30, 2010, the Union, by letter, demanded that the Respondent meet and bargain with it over the terms and conditions of employment of the newly certified unit. By facsimile dated January 6, 2011, the Respondent refused to recognize and bargain with the Union

<sup>2</sup> Member Hayes would have granted review in the underlying representation proceeding. He agrees, however, that the Respondent has not raised any new matters or special circumstances warranting a hearing in this proceeding or reconsideration of the decision in the representation proceeding, and that summary judgment is appropriate.

as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

### CONCLUSION OF LAW

By failing and refusing since January 6, 2011, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.<sup>4</sup>

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

### **ORDER**

The National Labor Relations Board orders that the Respondent, 735 Putnam Pike Operations, LLC d/b/a Greenville Skilled Nursing and Rehabilitation Center, Greenville, Rhode Island, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to recognize and bargain with New England Health Care Employees Union, District 1199, a/w Service Employees International Union (SEIU), as the exclusive collective-bargaining representative of the employees in the bargaining unit.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in

<sup>&</sup>lt;sup>3</sup> As noted above, the Acting Regional Director issued a corrected certification on December 2, 2010.

<sup>&</sup>lt;sup>4</sup> Although the Union's request to bargain predates the corrected certification, it is undisputed that the Respondent's refusal to bargain postdated that certification, and that it continues to refuse to bargain.

the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time registered nurses, including per diem registered nurses but excluding the director of nursing, day supervisor/unit manager, nurse practice educator, floating shift supervisor, MDS coordinator, guards and supervisors as defined in the Act.

- (b) Within 14 days after service by the Region, post at its facility in Greenville, Rhode Island, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.<sup>6</sup> Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 6, 2011.
- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 13, 2011

Wilma B. Liebman,	Chairman
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Craig Becker,	Member
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Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with New England Health Care Employees Union, District 1199, a/w Service Employees International Union (SEIU), as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

<sup>&</sup>lt;sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>&</sup>lt;sup>6</sup> For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time registered nurses, including per diem registered nurses but excluding the director of nursing, day supervisor/unit manager,

nurse practice educator, floating shift supervisor, MDS coordinator, guards and supervisors as defined in the Act.

735 PUTNAM PIKE OPERATIONS, LLC, D/B/A GREENVILLE SKILLED NURSING AND REHABILITATION CENTER